90-686

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CHRISTIAN GOSPEL CHURCH, INC.,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari and Appendix

MURRAY B. PETERSEN*
RICHARD A. CANATELLA
436 - 14th Street, Suite 411
Oakland, CA 94612-2703
Telephone: (415) 835-8676

Attorneys for Christian Gospel Church

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Should expressive and communicative elements of religious observance—such as a congregation's decision to worship in a home—receive the same constitutional protection afforded secular association and expression?

2. Should government denial of a religious group's decision to worship in a residential neighborhood be reviewed under the rational basis or compelling state interest test?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below were the following:

Appellant

Christian Gospel Church, Inc.[1];

Respondents

City and County of San Francisco;

Greater West Portal Neighborhood Association.

---

[1] There is no parent or subsidiary company to be listed. (See Supreme Court Rule 29.1.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

Constitutions, Statutes and Rules

Other Authorities

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CHRISTIAN GOSPEL CHURCH, INC.,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported officially in Slip Opinion of The United States Court of Appeals For The Ninth Circuit, No. 88-15490, filed February 27, 1990, pp. 2117-2129, and reproduced in Appendix A hereto. The opinion is reported unofficially at 896 F.2d 1221 (West Pub. Co. 1990). The Court of Appeals' order denying rehearing is reproduced in Appendix A.

JURISDICTION

The Court of Appeals entered its opinion and judgment on February 27, 1990. It denied a timely petition for rehearing on September 7, 1990. This Court has jurisdiction under 28 U.S.C. section 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I states in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The San Francisco Planning Code, section 209(a), states in relevant part:

> "The uses listed in Sections 209.1 through 209.9 are permitted in R (residential) Districts as indicated by the following symbols in the respective columns for each district:... (the symbol) C (is): Subject to approval by the City Planning Commission as a conditional use in this district as provided in Section 303 of this Code. . . ."

The San Francisco Planning Code, section 209.3(j) states in relevant part:

> "(Conditional use is required for a) Church or other religious institution which has a tax-exempt status as a religious institution granted by the United States Government, and which institution is used primarily for collective worship or ritual or observance of common religious beliefs. . . ."

The San Francisco Planning Code, section 303(c) states in relevant part:

> "After its hearing on the application, . . . the City Planning Commission shall approve the application and authorize a conditional use if the facts presented are such to establish:
>
> (1) That the proposed use or feature, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable for, and compatible with, the neighborhood or the community; and
>
> (2) That such use or feature as proposed will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity, or injurious to property, improvements or potential develop-

ment in the vicinity, with respect to aspects including but not limited to the following:

(A) The nature of the proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;

(B) The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;

(C) The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;

(D) Treatment given, as appropriate, to such aspects as landscaping, screening open spaces, parking and loading areas, service areas, lighting and signs; and

(3) That such use or feature as proposed will comply with the applicable provisions of this Code and will not adversely affect the Master Plan; . . ."

The San Francisco Master Plan, Residence Element states in relevant part:

"Policy 2 . . . . Non-residential uses should be allowed in exclusively residential areas only if they meet the following criteria.

— The use is primarily pedestrian oriented.

— The use serves the need of the immediate residential neighborhood and does not draw significant trade from outside the neighborhood.

— The use does not displace a unit suitable for residential occupancy.

— The use does not disrupt or detract from the livability of the surrounding neighborhood.

— There are no suitable locations in immediately adjacent commercial or mixed commercial and residential areas.

— The design of the building is in keeping with the established residential character of the area, and all signs are carefully regulated.

— Truck traffic servicing the use is minimized, and truck delivery hours are restricted. . . ."

The San Francisco Building Code section 206 states in relevant part:

"Any building, structure or property which is in violation of law or ordinance is declared to be a public nuisance. . . ."

The California Civil Code section 3491 states in full:

"The remedies against a public nuisance are: 1. Indictment or information; 2. A civil action; or, 3. Abatement."[2]

STATEMENT OF THE CASE

1. Introduction

This case involves a denial of the right of a church group to assemble for worship in a residential neighborhood. Petitioner is a California nonprofit, religious corporation which applied to respondent for a conditional use permit to hold Sunday prayer and worship services, and Wednesday evening bible study, for less than 50 persons in the living room at the home of its pastor.

Respondent's planning code prohibits churches in residential districts unless a conditional use permit is granted, and it is determined that the church use is "necessary or desirable", not "determimental to the health, safety, convenience or general welfare", complies with applicable provisions of the code "and will not adversely affect the Master Plan."

2. Proceedings before the San Francisco Planning Commission

Petitioner received a "negative declaration" from the City Planning environmental review officer who stated the "project could not have a significant effect on the environment." However,

---

[2] The full text of the ordinances quoted above are set forth in the appendix as reguired by Supreme Court Rules 14.1(f), and (k).

a neighborhood association vigorously opposed the application and obtained 190 signatures on a petition.[3] Though petitioner's architect had received preliminary City planning staff approval immediately prior to the Commission meeting, and despite testimony of the City zoning administrator—that "churches in residential neighborhoods serve the residents"—in the face of continued neighborhood opposition, the commission denied the application concluding "the parishoners (sic) would not necessarily come from the surrounding neighborhood", and there was a "potential for noise and traffic" which "may adversely impact the predominately residential character of the neighborhood". Further, since there would be "singing and the playing of music by the congregation" this "would be detrimental to the health, safety, convenience and general welfare."

3. Procedural History

Rather than risk prosecution under California Civil Code section 3491,[4] petitioner brought this civil rights action claiming permit denial was a violation of the free exercise and equal protection clauses of the United States Constitution. Petitioner offered uncontroverted expert testimony that "home worship" was a safeguard against religious persecution, and in harmony with fundamental Christian doctrine that Jesus is "coming again and

---

[3] The petition stated: "Our opposition is based on the following: (1) There are too many churches in our residential neighborhood. (2) There are vacancies . . . in commercial areas, that would be better suited for this church. (3) This proposed use does not maintain neighborhood characteristics as required by proposition "M". (4) There is a housing shortage in our residential neighborhood. To convert a single family dwelling into a church would further reduce the number of single family dwellings available in our neighborhood. (5) Allowing this use as a church, even on a part-time basis, would create additional traffic that is dangerous to us and our families. There is insufficient parking available in the immediate area. The noise created by this church would interfere with the quiet enjoyment of our homes."

[4] California Civil Code section 3491 provides: "The remedies against a public nuisance are: 1. Indictment or information; 2. A civil action; or, 3. Abatement."

nonresidential structures for worship are unnecessary and contrary to the belief."[5]

The district court—exercising jurisdiction under 28 U.S.C. section 1343(a)—granted summary judgment for respondent and the private defendants, even though respondent demonstrated no compelling interest to override petitioner's claim for individual exemption from the zoning regulation.

The Ninth Circuit affirmed concluding that respondent's zoning ordinance did not violate the free exercise or equal protection clauses, either facially or as applied.

REASONS FOR GRANTING THE WRIT

This case presents a First Amendment issue of great importance to religious freedom. If the decision below is allowed to stand, assembly for worship will rank below assembly for secular purposes. Such a result contravenes our national heritage. Our Constitution does not seek to secularize society, but fosters tolerance for religious belief as well as religious practice.

The Ninth Circuit opinion has turned the Constitution upside down under a San Francisco zoning ordinance which permits all lawful forms of secular assembly on one hand, while denying religious assembly—without a compelling reason—on the other.

Conceding that departure from the San Francisco "master plan" "residence element" may upset some—and even cause "trouble"—our Constitution says we must take that risk. Indeed, our history teaches that it is just this sort of hazardous freedom, this openness, that is the basis of our national strength. Religious freedom deserves no less forbearance.

---

[5] *Christian Gospel Church v. City and County of San Francisco,* 896 F.2d 1221, 1224 (1990), rehearing denied, September 7, 1990.

Compare *Wisconsin v. Yoder,* 406 U.S. 205, 209-210 (1972) (Old Order Amish offered uncontradicted expert testimony on relationship of Amish belief concerning school attendance to the more general tenets of their religion).

For these reasons, review by this Court presents an opportunity to establish the principle, well recognized in precedent—though seemingly ignored by the Ninth Circuit—that religious assembly is as much deserving of Constitutional protection as secular assembly.

I

The Decision of the Ninth Circuit Conflicts with a Decision of the Fifth Circuit—Though It Is in Harmony with Decisions of the Sixth, Tenth and Eleventh Circuits—and These Decisions Involve an Important Question of Constitutional Law which Has Not Been, But Should Be, Settled by This Court

The first of the Court of Appeals decisions involving tension between the undisputed governmental right to regulate religious land use,[6] and the decision of a congregation to locate a church in a prohibited area, arose in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,* 699 F.2d 303 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983), where the Sixth Circuit upheld a zoning provision prohibiting churches in residential zones, and denied a free exercise challenge to the refusal of a building permit to construct a church building on residential property owned by the church.

Lakewood was followed in *Grosz v. City of Miami Beach, Florida,* 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984), upholding prosecution of a rabbi who conducted worship services in his own home in violation of a zoning provision which prohibited such activity.

---

[6] See *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971): "Our prior holdings do not call for total separation between church and state. . . . Some relationship between government and religious organizations is inevitable. [Citations.] Fire inspections, building and zoning regulations, . . . are examples of necessary and permissible contacts."

In the landmark zoning case, *Village of Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926), the Court upheld the validity of a comprehensive zoning plan which excluded commercial activities from residential districts, on the ground such regulation was a legitimate exercise of a municipality's police power. (Id. at p. 395.)

Lakewood was also followed in *Messiah Baptist Church v. County of Jefferson, Colorado,* 859 F.2d 820 (10th Cir. 1988), cert. denied, ____ U.S. ____, 109 S.Ct. 1368 (1989), where the Tenth Circuit rejected a free exercise challenge to a zoning provision requiring a permit as a condition of the construction of a place of worship in an agricultural zone.

A departure from *Lakewood* occurred in *Islamic Center of Miss., Inc. v. City of Starkville, Miss.,* 840 F.2d 293 (5th Cir. 1988), where the Fifth Circuit upheld a free exercise challenge to a zoning provision requiring a permit for the establishment of a Muslim mosque in a residential neighborhood.

It is clear from reading these cases that courts are frequently forced to undertake an *ad hoc* balancing analysis when existing free exercise doctrine does not command a specific result.[7] In the Sixth, Ninth and Tenth Circuit decisions, the Courts did not require the municipalities to show that the zoning ordinance furthered a compelling state interest—the stringent standard normally applied by this Court in cases where the government has in place a system of individual exemption[8]—and instead demanded only that the ordinances comport with due process tested

---

[7] See *Grosz v. City of Miami Beach, Florida,* supra, 721 F.2d at p. 739: "In discussing the process for reaching a final balance we noted earlier that courts are frequently forced to undertake an ad hoc balancing when existing free exercise doctrine does not command a specific result."

[8] *Sherbert v. Verner,* 374 U.S. 398, 403 (1963): "Plainly enough, appellant's conscientious objection to Saturday work consititutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, threfore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .' *NAACP v. Button,* 371 U.S. 415, 438 [1963]."

against the deferential minimal rationality standard.[9] However, "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides." *Hobbie v. Unemployment Compensation Appeals Comm'n of Florida*, 480 U.S. 13 (1987), quoting Justice O'Connor, concurring and dissenting in *Bowen v. Roy*, 476 U.S. 693 [106 S.Ct. 2147, 2166] (1986).[10]

Yet the Court has never squarely addressed a case in which a challenged law regulated religious activity not directly tied to a fundamental religious tenet—like a "neutral" zoning ordinance—and has assumed in its free exercise decisions that the restricted practices are fundamental to the challenger's faith.[11] This has led the Courts of Appeals to turn the assumption into a requirement

---

[9] See *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, supra, 699 F.2d at p. 308; *Messiah Baptist Church v. County of Jefferson, Colorado*, supra, 859 F.2d at p. 823; *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221, 1225 (1990), rehearing denied, September 9, 1990.

Compare *Islamic Center of Miss., Inc. v. City of Starkville, Miss.*, supra, 840 F.2d at p. 299.

[10] See also, *Bowen v. Roy*, 476 U.S. 693 [106 S.Ct. 2147, 2168] (1986), Justice O'Connor, concurring and dissenting: "This Court's [free exercise] opinions have never turned on so slender a reed as whether the challenged requirement is merely a 'reasonable means of promoting a legitimate public interest.' "

[11] See, e.g., *Frazee v. Illinois Department of Employment Security*, ___ U.S. ___; 109 S.Ct. 1514, 1517 (1989): "It is true as the Illinois court noted, that each of the claimants in these cases (*Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Compensation Appeals Comm'n of Florida*, 480 U.S. 136 (1987)) was a member of a particular religious sect, but none of those decisions turned on that consideration or on any tenet of the sect involved that forbade the work the claimant refused to perform. Our judgments in those cases rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question. . . . Because Thomas unquestionably had a sincere belief that

conditioning the application of free exercise analysis on the threshold determination that the restricted activity—the location of places of worship—is fundamental to the claimant's religion.[12]

---

his religion prevented him from doing such work, he was entitled to invoke the protection of the Free Exercise Clause."

See also, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447, 449, 451 (1987): "It is undisputed that the Indian respondents' beliefs are sincere and that the Governments' proposed actions will have severe adverse effects on the practice of their religion." (Id. at p. 447.) "This Court cannot determine the truth of the underlying beliefs that led to the religious objection here or in [*Bowen v. Roy*, 476 U.S. 693 (1986)], see *Hobbie v. Unemployment Appeals Com'n of Fla.*, 480 U.S. 136, 144, n. 9 (1987) . . . ." (Id. at p. 449.) "The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices. . . . [W]e can assume that the threat to the efficacy of at least some religious practices is extremely grave." (Id. at p. 451.)

[12] See, e.g., *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, supra, 699 F.2d at p. 307: "There is no evidence that the construction of Kingdom Hall is a ritual, a 'fundamental tenet,' or a 'cardinal principle' of its faith. At most the Congregation can claim that its freedom to worship is tangentially related to worshipping in its own structure. However, building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's beliefs."

Grosz v. City of Miami Beach, Florida, supra, 721 F.2d at p. 739: "The religion of Appellee, Naftali Grosz, requires him to conduct religious services twice daily in the company of at least ten adult males. Solicitation of neighborhood residents to attend and the participation of congregations larger than ten, the conduct on which the City based its notice of violation, are not integral to Appellee's faith."

Messiah Baptist Church v. County of Jefferson, Colorado, supra, 859 F.2d at pp. 824-825: "The A-2 zoning regulations do not in any way regulate the religious beliefs of the Church. . . . The Church makes only a vague reference to a preference for a pastoral setting, but such is of no consequence to this analysis. What is important is that the record contains no evidence that building a church or building a church on the particular site is intimately related to the religious tenets of the church.

Such a narrow reading of the free exercise precedents ignores the danger that the exercise of religion may be obstructed by zoning regulations prohibiting what are essentially expressive and communicative elements of religious observance as much deserving of protection as religious doctrine. The approach of the Courts of Appeals effectively excludes religiously motivated activity not doctrinally mandated from the protection of the free exercise clause and allows government to burden such activities with zoning regulations[13] that are only minimally rational.[14]

Petitioner respectfully suggests this Court resolve the conflict in the Courts of Appeals, created by their own extension of free exercise precedent, and address this important question of constitutional law by broadening established free exercise analysis—as

---

At most, the record discloses the Church's preference is to construct its house of worship upon its land. . . ."

Christian Gospel Church v. City and County of San Francisco, supra, 896 F.2d at p. 1224: "Most significantly, the Church has made no showing of why it is important for the Church to worship in this particular home. The government action in this case did not prevent all home worship. Rather, it involved the denial of a permit to worship in this specific home. The burdens imposed by this action are therefore of convenience and expense, requiring appellant to find another home or another forum for worship. We find that the burden on religious practice in this zoning scheme is minimal."

Compare *Islamic Center of Miss., Inc. v. City of Starkville, Miss.*, supra, 840 F.2d at p. 300.

[13] See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), stating that before a zoning ordinance can be declared unconsitutional on due process grounds, the provisions must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

[14] See *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, supra, 699 F.2d at p. 308; *Messiah Baptist Church v. County of Jefferson, Colorado*, supra, 859 F.2d at p. 823; *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221, 1225 (1990), rehearing denied, September 9, 1990.

Compare *Islamic Center of Miss., Inc. v. City of Starkville*, Miss., supra, 840 F.2d at p. 299.

the Court has done in the case of doctrinally mandated religious activity[15]—to protect a congregation's decision to locate a place of worship with due recognition for the expressive and communicative elements of religious practice.[16]

---

[15] See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory school-attendance law violated central tenet of Amish faith); *Sherbert v. Verner*, 374 U.S. 398 (1963) (denial of unemployment benefits infringed Seventh Day Adventist's doctrinal prohibition of Saturday work); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981) (denial of unemployment benefits infringed Jehovah's Witness' conscientious objection to production of war materials); *Hobbie v. Unemployment Compensation Appeals Comm'n of Florida*, 480 U.S. 13 (1987) (denial of unemployment benefits infringed Seventh Day Adventist's doctrinal prohibition of Saturday work).

Compare *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450: "It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are suject to scrutiny under the First Amendment. . . . This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. . . ."

[16] See *Islamic Center of Miss., Inc. v. City of Starkville, Miss.*, supra, 840 F.2d at p. 300: "The assembly of a community of believers is an integral part of most religious faiths, certainly of the Muslims. The assembly of those bound by common beliefs and observances not only serves to create a sense of community among the members through the shared expression of their beliefs, it also communicates to outsiders the church's identity as a group devoted to a common ideal. By group worship, each worshipper communicates to outsiders the identity of the group and his own identity as a member of it, a form of self-expression. Ritual preserves, evidences, and perpetuates faith. If government exercises its power to affect group worship, it must demonstrate at least that the burden imposed serves an important government purpose and also that this purpose could not be accompanied by a means less burdensome to the exercise of religion."

II

Church Zoning Regulations Do Infringe Religious Freedom—Though They Do Not Force Believers to Act Against Their Consciences, and No Creed Dictates That a Church Be Located in a Residential Neighborhood—and Present a Real Threat to Freedom of Assembly, Association and Expression, Along with the Correlative Free Exercise of Religion.

The rule which appears to have the support of the majority of the Court is that the First Amendment bars only outright prohibitions, indirect coercion, and penalties on the free exercise of religion. *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450 (1987). Other "incidental effects of government programs," even those "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," simply do not give rise to Constitutional concerns. Id., 485 U.S. at 450-451.[17]

But the rule should not apply in church zoning cases because these present a situation analogous to the unemployment cases

---

[17] The rule was announced in *Bowen v. Roy,* 476 U.S. 693 (1986), declining application of Sherbert analysis (compelling governmental interest test) to a federal statutory scheme requiring benefit applicants and recipients to provide their Social Security numbers, against parents' free exercise challenge to the requirement on the ground it would " 'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." (Id., at 696.)

It was followed in *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1987), declining application of *Sherbert* analysis to the federal government's logging and road constrution activities on lands used for Native American Indian religious practice, against a free exercise challenge that those activities "could have devastating effects on traditional Indian religious practices." (Id., at 451.)

It was followed again in *Employment Division, Department of Human Resources of Oregon v. Smith,* ___ U.S. ___ (Dock. No. 88-1213, April 17, 1990) 58 U.S.L.Week 4433 at 4439, declining *Sherbert* analysis to a generally applicable criminal ban on peyote use, against the free exercise challenge that peyote use was religiously inspired practice.

where the municipality has in place a system of individual exemptions[18], and therefore, municipalities may not refuse to extend the system to cases of "religious hardship" without compelling reason.[19]

Moreover, though zoning ordinances do not force believers to violate the doctrines of their faith, they nevertheless require alteration of ritualistic elements of assembly, association and expression.[20] The regulation of the location of churches, therefore, involves not only the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with constitutionally protected assembly, association and expression.[21]

---

[18] See infra, at 2: "CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED."

[19] *Employment Division, Department of Human Resources of Oregon v. Smith,* ____ U.S. ____ (Dock. No. 88-1213, April 17, 1990) 58 U.S.L.Week 4433 at 4436: "The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemption, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons."

[20] See Comment, *Zoning Ordinances Affecting Churches: A Proposal For Expanded Free Exercise Protection,* 132 U.Pa.L.Rev. 1131, 1149-1152 (1984): "The assembly of the members of the church serves not only to create a sense of community among the members themselves through the shared expression of common beliefs, but also to communicate to outsiders the church's identity as a group committed to a common ideal. [Paragraph] An individual's participation in group worship may serve not only to communicate her views within and without the group, but also as a form of self-expression, important to the inward self. . . . The sense of community created by group worship is a factor in many persons' sense of self. Moreover, the very decision to be a member of a religious group, and to publicize that decision by attending religious services, may serve as a statement to the world of the way in which the believer chooses to be identified. . . ." (Id. at 1150-1151.)

[21] See *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984): "An individual's freedom to speak, to worship, and to petition the

Significantly, the only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.[22]

Therefore, the constitutional analysis appropriate for a neutral government act like a church zoning ordinance should be the same as for neutral government acts that circumscribe secular assembly, association and expression: that the government justify every such regulation by proving not only that it serves an important government purpose, but also that the purpose could not be accomplished by a means less restrictive of expressive freedom.[23]

---

government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. [Citations.] According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. [Citations.] Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. [Citations.] . . . ."

[22] *Employment Division, Department of Human Resources of Oregon v. Smith,* ___ U.S. ___ (Dock. No. 88-1213, April 17, 1990) 58 U.S.L.Week 4433 at 4436: "And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1983) ('An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.')"

[23] See Comment, *Zoning Ordinances Affecting Churches: A Proposal For Expanded Free Exercise Protection,* 132 U.Pa.L.Rev. 1131, 1153-1161 (1984).

CONCLUSION

In the free exercise context, churches serve much the same function as public forums do in the free speech, association and assembly context, under the highest level of constitutional protection. The right to assemble or speak in a public forum cannot be absolutely prohibited, and may only be infringed by narrowly-drawn time, place, and manner restrictions. Similarly, the place of worship is central to the first amendment concept of free exercise as essentially the only place of religious assembly, and the central place for the expression of religious speech. Thus when local governments encumber the use of buildings for religious worship through zoning regulations, they are in fact impinging on speech, assembly, and religious exercise. What is at stake is the power of local government, through zoning ordinances, to prohibit legitimate and protected first amendment uses at particular locations. Indeed, if first amendment free exercise rights are not triggered by the impingement on places of worship, the right of free exercise of religion is for practical purposes subject to broad infringement in all aspects except, perhaps, belief.

Property is not an unlimited commodity. Congregations pay an onerous price in time, money, and convenience when forced to select worship sites at a considerable distance from their homes. Although other sites may be available, the First Amendment requires that we know where, how many, how suitable, how convenient, and at what cost before we properly can judge the burden on exercise as compared to the burden on the municipality's legitimate interests. The *Euclid* rational basis standard trivializes the burdening role which zoning can and does play in the exercise of religious expression. On the other hand, the complexity of meeting the legitimate public concerns expressed in *Euclid* suggests that applying the most rigid compelling state interest test would be improvident when there is available a set of well-developed standards for balancing these unavoidable and constantly recurring conflicts between the two constitutionally acknowledged interests.

Through its precedents, the Court has developed a standard for reviewing government regulations which infringe on first amendment interests, and has applied a "time, place, and manner" test to speech and assembly cases. Petitioner submits that cases involving the effect of zoning on religious free exercise are properly subject to the same analysis. Therefore, rather than being cast adrift to engage in decision by ad hoc characterization, reliance on the speech and assembly cases provides a useful standard and procedural framework for determining the proper balance between the interests of government and persons seeking to engage in religious speech, assembly, and worship activities.

Respectfully submitted,

MURRAY B. PETERSEN
RICHARD A. CANATELLA

October 1, 1990

APPENDIX

TABLE OF CONTENTS

United States Court of Appeals

For the Ninth Circuit

Christian Gospel Church, Inc.
Plaintiff-Appellant,

v.

City and County of San Francisco, et. al.,
Defendant-Appellee.

[FILED SEPT. 7, 1990]

NO. 88-15490

ORDER

Before: Poole, Nelson and Wiggins, Circuit Judges.

The members of the panel voted unanimously to deny the petition for rehearing, and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTHCIRCUIT

CHRISTIAN GOSPEL CHURCH, INC., *Plaintiff-Appellant,* v. CITY AND COUNTY OF SAN FRANCISCO, et al., *Defendants-Appellees.*	No. 88-15490 D.C. No. CV-88-1219 RHS OPINION

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, District Judge, Presiding

Argued and Submitted
November 15, 1989—San Francisco, California

Filed February 27, 1990

Before: Cecil F. Poole, Dorothy W. Nelson and
Charles Wiggins, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Constitutional Law

Affirming the district court's grant of summary judgment, the court held that the San Francisco Planning Code conditional use permit required for the establishment of a church in a residential neighborhood does not violate the free exercise clause of the first amendment.

Appellant the Christian Gospel Church appealed the district court's grant of summary judgment in favor of appellees the City and County of San Francisco, the Greater West Portal Neighborhood Association, and Howard Strassner. The Church contended that the denial of a zoning permit which would have enabled the Church to hold worship services in a single-family residence at 357 Vicente Street in a residential neighborhood was a violation of the free exercise clause of the first amendment and of the equal protection clause of the fourteenth amendment. In addition, the Church claimed that appellees conspired to violate the civil rights of the Church.

[1] The court has articulated a general standard for evaluating the impact of a government provision on the exercise of religion and found the test appropriate for analyzing a challenge to zoning laws. [2] First, the impact on religion. The Church listed three reasons why it was burdened by the denial of a conditional use permit, all three centering around the importance of home worship. [3] Since the Church had, until applying for the permit, worshipped in the banquet room of a hotel, the court did not find denial of the permit a significant burden on the Church. The burden is not great when the government action does not restrict current religious practice but rather prevents a change in religious practice. [4] More significantly, the government action did not prevent all home worship. Rather, it involved the denial of a permit to worship in this specific home.

[5] Second, government interest. The city has an interest in protecting the interests of the residents in the neighborhood of 357 Vicente Street. As those neighbors asserted in their petition, the use of that dwelling for worship services would bring traffic and noise problems to an otherwise quiet residential neighborhood.

[6] Third, balancing the interests. This involves analyzing the extent to which recognition of an exemption from the government action would impede the objectives sought by the

state. In this case, the burden on religious practice is minimal, while the government's interests are strong. The court concluded that an exemption from the zoning scheme was not warranted and that the denial of the permit did not violate the free exercise clause.

[7] Since the zoning scheme does not implicate a suspect class or fundamental right, the appropriate question for the equal protection analysis was whether or not the provision is rationally related to a permissible state interest. [8] The court determined that the City and County of San Francisco has a legitimate interest in preserving the welfare and character of its neighborhoods and that consideration of neighborhood opinion in pursuing this interest is lawful. Thus the denial of the permit was rationally related to this important government objective, and the Church's equal protecti rights were not violated by the denial of a permit to this particular church. [9] The Church was treated no differently than a school or community center would have been, and the court could find no reason why churches alone should be treated differently from other types of assembly. [10] The court he. that there is a rational basis for a law requiring all places of public assembly to obtain a conditional use permit before establishment in certain neighborhoods. There is no equal protection violation in such a zoning requirement.

COUNSEL

Albert E. Levy, San Francisco, California, for the plaintiff-appellant.

Melba Yee, Deputy City Attorney, San Francisco, California, for the City and County of San Francisco, defendant-appellee.

Zach Cowan, San Francisco, California, for the Greater West Portal Neighborhood Association and Howard Strassner, defendants-appellees.

OPINION

NELSON, Circuit Judge:

The Christian Gospel Church appeals from a grant of summary judgment by the district court in favor of appellees, the City and County of San Francisco, the Greater West Portal Neighborhood Association and Howard Strassner, finding no civil rights violations. Appellant contends that the denial of a zoning permit which would have enabled the Church to hold worship services in a residential neighborhood was a violation of the free exercise clause of the first amendment and of the equal protection clause of the fourteenth amendment. In addition, appellant claims that appellees conspired to violate the civil rights of the Church. We affirm the district court's grant of summary judgment.

FACTS

In May, 1987, the Christian Gospel Church (hereinafter "Church") applied for conditional use authorization to establish a church in a single-family residence at 357 Vicente Street, San Francisco, in an area zoned for single-family residences. The Church had previously held its worship services in a rented banquet room at a hotel. The Church proposed to use the dwelling at 357 Vicente Street for Sunday morning worship services as well as Bible study and prayer meetings on Wednesday and Sunday evenings. The Church estimated that the congregation would include 50 people maximum.

The San Francisco City Code at § 209.3(j) prohibits churches in residential districts unless a conditional use permit is granted. The criteria for evaluating an application for such a permit, as set forth in Planning Code § 303(c), includes determining that: (1) the proposed use must be necessary or desirable for, and compatible with, the neighborhood or the

community; (2) the use will not be detrimental to the health, safety, convenience or general welfare of persons residing in the vicinity; (3) the use must comply with the applicable provisions of the code and will not adversely affect the City's Master Plan.

A neighborhood organization, the Greater West Portal Neighborhood Association (hereinafter "Neighborhood Association") opposed the granting of a conditional use permit to the Church and circulated a petition in the neighborhood of 357 Vicente calling for a denial of the permit.[1] The petition was signed by 190 residents.

On October 22, 1987 the San Francisco City Planning Commission denied appellant's application for a conditional use permit. Specifically, the Commission concluded that the Church could create noise, traffic and parking problems and that it would adversely affect the character of the neighborhood.

The Church filed this action in district court against the City and County of San Francisco, Robert Passner (the city's zoning administrator), six members of the Department of City Planning, the Neighborhood Association, and Howard

---

[1]The petition stated:

> Our opposition is based on the following: (1) There are too many churches in our residential neighborhood. (2) There are vacancies on Taraval Street and West Portal Avenue, both commercial areas, that would be better suited for this church. (3) This proposed use does not maintain neighborhood characteristics as required by proposition "M". (4) There is a housing shortage in our residential neighborhood. To convert a single family dwelling into a church would further reduce the number of single family dwellings available in our neighborhood. (5) Allowing this use as a church, even on a part-time basis, would create additional traffic that is dangerous to us and our families. There is insufficient parking available in the immediate area. (6) The noise created by this church would interfere with the quiet enjoyment of our homes.

Strassner (member of the Neighborhood Association). The City defendants and the Neighborhood Association defendants moved separately for summary judgment. The district court granted summary judgment in favor of defendants. The Church filed a timely notice of appeal.

ANALYSIS

Standard of Review. We review *de novo* a district court grant of summary judgment. *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 761 F.2d 553, 555 (9th Cir. 1985).

I. The Zoning Provision and Free Exercise of Religion

[1] The Church claims that the district court erred in concluding that the San Francisco Planning Code § 209.3(j) requirement that a conditional use permit for the establishment of a church in a residential neighborhood does not violate the free exercise clause of the first amendment. The question of whether a zoning provision violates the free exercise clause is one of first impression for this circuit.[2] We have articulated a general standard for evaluating the impact of a government provision on the exercise of religion and we find

[2]Other circuits have addressed this issue. In *Islamic Center of Miss., Inc. v. City of Starkville, Miss.*, 840 F.2d 293 (5th Cir. 1988), the Fifth Circuit held that a provision requiring a permit for the establishment of a place of worship anywhere in the town of Starkville was unconstitutional when such a permit had never been granted to a Muslim congregation. The Sixth Circuit in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983), upheld a zoning provision which prohibited the construction of a church on a specific lot. In *Messiah Baptist Church v. County of Jefferson, State of Colo.*, 859 F.2d 820 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 1368 (1989), the Tenth Circuit upheld a zoning provision which precluded construction of a church in an agricultural zone. Finally, in *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984), the court upheld the prosecution of a rabbi who conducted worship services in his home in violation of zoning laws.

that this test is appropriate for analyzing a challenge to zoning laws. This test involves examining the following three factors:

> (1) the magnitude of the statute's impact upon the exercise of the religious belief;
> (2) the existence of a compelling state interest justifying the imposed burden upon the exercise of the religious belief; and
> (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

Callahan v. Woods, 736 F.2d 1269, 1273 (9th Cir. 1984); *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1367 (9th Cir. 1986).

[2] *The impact on religion.* The Church listed three reasons why it was burdened by the denial of a conditional use permit. All three of these reasons center around the importance of "home worship". First, the Church emphasized the importance of home worship in protecting minority religions from persecution. Second, the Church's expert witness stated that "[t]he fundamental belief in house church is that Jesus is soon coming again and nonresidential structures for worship are unnecessary and contrary to the belief." Third, appellant argued that churches have a strong interest in a quiet environment and "have a valid interest in being insulated from certain kinds of commercial establishments." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982).

[3] It is uncontroverted that the Church had, until applying for this permit, worshiped in the banquet room of a hotel. It is difficult for us to find a significant burden on religious practice if the Church had not previously been practicing home worship. The burden on religious practice is not great when the government action, in this case the denial of a use permit, does not restrict current religious practice but rather prevents a change in religious practice.

[4] Most significantly, the Church has made no showing of why it is important for the Church to worship in this particular home. The government action in this case did not prevent all home worship. Rather, it involved the denial of a permit to worship in this specific home. The burdens imposed by this action are therefore of convenience and expense, requiring appellant to find another home or another forum for worship. We find that the burden on religious practice in this zoning scheme is minimal.

Government interest. A zoning system "protects the zones' inhabitants from problems of traffic, noise and litter, avoids spot zoning, and preserves a coherent land use zoning plan." *Grosz*, 721 F.2d at 738. These concerns are particularly strong in this case since the Church is applying for nonresidential use in a residential neighborhood. San Francisco has a strong interest in the maintenance of the integrity of its zoning scheme and the protection of its residential neighborhoods. *See City of Memphis v. Greene*, 451 U.S. 100, 127 (1981); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

[5] In addition, the city has an interest in protecting the interests of the residents in the neighborhood of 357 Vicente Street. As those neighbors asserted in their petition, the use of that dwelling for worship services would bring traffic and noise problems to an otherwise quiet residential neighborhood.

[6] *Balancing the interests.* The third prong of the free exercise test involves analyzing the extent to which recognition of an exemption from the government action would impede the objectives sought by the state. We have found that the burden on religious practice in this case is minimal. The government's interests in not allowing an exception to the zoning provision are, in contrast, strong.[3] We find that the burden on

[3]These interests include protecting the integrity of the zoning scheme and protecting the interests of the neighborhood of 357 Vicente Street.

religious practice in this case does not warrant an exemption from the zoning scheme and affirm the finding of the district court that the zoning scheme requiring the grant of a conditional use permit for worship services to be held in this residential neighborhood does not violate the free exercise clause of the first amendment.

II. Equal Protection

Standard of equal protection review. The Church contends that the zoning provision under which it is required to obtain a conditional use permit discriminates against churches and against this particular church. Appellant argues that within 4 years of the filing of this lawsuit, 30 conditional use permits were granted and only 4 were denied, and therefore that the denial was unusual. In addition, appellant argues that since permits are not required for senior citizen dwellings, residential care facilities, and open space and recreational facilities, permit requirements for churches violate equal protection. All assembly-type activities, such as schools, churches and community centers, in this particular zone require conditional use permits.

[7] Since the zoning scheme does not implicate a suspect class or a fundamental right, the appropriate question for this equal protection analysis is whether or not the provision is rationally related to a permissible state objective. *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966).

Discrimination against this particular church. The Church contends that it was discriminated against because few church applications for conditional use permits were actually denied by the City Planning Commission. The Church argues that the true reason for permit denial was neighborhood opposition. In response, the City of San Francisco points out that although 25 of the 30 applications for church permits were granted in the 4 years prior to this action, only 3 of those 25 permits were granted in residential neighborhoods. Thus,

although church permits are frequently granted, they are not frequently granted in neighborhoods like the one surrounding 357 Vicente Street.

Contrary to the arguments of the Church, neighborhood opposition to the granting of a conditional use permit is not unlawful and should be considered by the Planning Commission. One of the factors listed in the Planning Code for the Planning Commission to consider in evaluating permit applications is "[t]hat such use . . . will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity." San Francisco Planning Code § 303(c)(2). The views of the residents of the area surrounding the property are important for the Commission to consider in evaluating the impact of a permit on the neighborhood.

[8] The City and County of San Francisco has a legitimate interest in preserving the welfare and character of its neighborhoods. Consideration of neighborhood opinion in pursuing this interest is lawful. We find that the denial of the permit was rationally related to this important government objective. Thus, appellant's equal protection rights were not violated by the denial of a permit to this particular church.

[9] *Discrimination against churches.* Appellant also claims that the provision requiring use permits for churches (and other forms of public assembly) but not other nonresidential uses, such as parks and child care facilities, violates equal protection. In order to prevail, the Church must make a showing that a class that is similarly situated has been treated disparately. *See Palmer v. Thompson,* 403 U.S. 217, 225 (1971) (no violation of equal protection when state action affected blacks no differently than whites); *Shahla v. Immigration and Naturalization Service,* 749 F.2d 561, 563 (9th Cir. 1984) (no equal protection violation when appellant failed to produce evidence that INS distinguished between classes of Iranian immigrants). "[A]ny equal protection argument requires the

existence of at least two classifications of persons which are treated differently under the law." *United States v. Horton*, 601 F.2d 319, 323-324 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979). The Church was treated no differently than a school or community center would have been. We do not see any reason why churches alone should be treated differently than other types of assembly.

[10] We find that there is a rational basis for a law requiring all places of public assembly to obtain a conditional use permit before establishment in certain neighborhoods. These activities bring undesired noise and traffic problems to a neighborhood. There is no equal protection violation in such a zoning requirement.

III. Conspiracy to Violate Constitutional Rights

The Church claims that the appellees in this action conspired to deprive it of its first amendment right to the free exercise of religion. The district court found that:

> plaintiff's conspiracy claim is without merit and factual basis. Defendants Greater West Portal Neighborhood Association and Howard Strassner have certain constitutional rights under the First Amendment to oppose a zoning permit application pending before the San Francisco Planning Commission. The exercise of that right does not constitute a conspiracy between the defendants.

Christian Gospel Church, Inc. v. City and County of San Francisco, No. C88-1219 RHS (N.D. Cal. Oct. 17, 1988). We affirm the decision of the district court.

The Church claims that the private appellees conspired to violate the Church's civil rights by circulating a petition, testifying before the Planning Commission and writing letters to the editor. We heard a similar claim in *Evers v. County of Cus-*

ter, 745 F.2d 1196 (9th Cir. 1984), in which a landowner sued his private neighbors for violation of due process when the neighbors petitioned the government to declare that the road in front of the landowner's house was a public road and could not be fenced off. We held that the action of the neighbors "falls within the first amendment's protection of the right to petition the government for redress of grievances." *Id.* at 1204. Similarly the Neighborhood Association in this case was fully protected by the first amendment when it campaigned against the granting of the permit.

The Church contends that the actions of the Neighborhood Association are not entitled to first amendment protection because they were defamatory. However, this is a lawsuit alleging violations of civil rights, not the tort of defamation. It is incongruous for the Church to claim that because it was defamed, its free exercise rights were therefore violated.

Since the private appellees did not violate the civil rights of the Church, there can be no cause of action against the government for conspiring with the private appellees to violate the civil rights of the Church. *Pacific Tel. and Tel. Co. v. MCI Communications Corp.*, 649 F.2d 1315, 1319 (9th Cir. 1981) (no action for civil conspiracy if there is no independent wrongful act). *See also Landrigan v. City of Warwick*, 628 F.2d 736, 742 (1st Cir. 1980) (in order to prevail on a claim of conspiracy to violate civil rights, there must be a showing of an actual deprivation of those rights). Likewise, the private appellees cannot be held to have conspired with the government to violate the civil rights of the Church when their actions were protected by the first amendment and when the government did not violate the appellant's civil rights.

The neighbors of 357 Vicente Street were doing what citizens should be encouraged to do, taking an active role in the decisions of government. Their involvement was certainly not actionable. We find that there was no conspiracy to deprive the Church of its civil rights.

IV. Sanctions and Attorneys' Fees

We deny the request of appellees for attorneys' fees and sanctions against appellants.

AFFIRMED

United States District Court

Northern District Of California

Christian Gospel Church, Inc.,
Plaintiff,

vs.

City And County Of San Francisco, Robert Passmore,
The Greater West Portal Neighborhood Association,
and Howard Strassner,
Defendants.

[FILED Oct. 17, 1988]

No. C88-1219 RHS

FINAL ORDER AND JUDGMENT GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Tne motions for summary judgment filed by defendants City and County of San Francisco and Robert W. Passmore, and defendants Greater West Portal Neighborhood Association and Howard Strassner, pursuant to Rule 56 of the Federal Rules of Civil Procedure, came on for hearing on September 23, 1988. All of the parties having had an opportunity to present written submissions and argument before the Court,

It is the finding of the Court that the zoning regulations of the City and County of San Francisco do not infringe on plaintiff's free exercise of religion or violate equal protection. The zoning laws do not prevent plaintiff church from meeting in a home; the church is merely prevented from meeting in the particular home located at 357 Vicente. There is no evidence of any circumstances to compel the use of this particular property for plaintiff's church. The City's zoning regulations afford ample locations elsewhere to accommodate a home church. There is further no evidence that similarly situated persons receive disparate treatment under the zoning scheme.

The Court further finds that plaintiff's conspiracy claim is without merit and factual basis. Defendants Greater West Portal Neighborhood Association and Howard Strassner have certain

constitutional rights under the First Amendment to oppose a zoning permit application pending before the San Francisco Planning Commission. The exercise of that right does not constitute a conspiracy between the defendants.

There being no genuine issue as to any material fact, and it appearing that defendants are entitled to a judgment as a matter of law,

It is Hereby Ordered, Adjuged and Decreed that:

1. There is no genuine issue as to any material fact.

2. Defendants' motions for summary judgment are granted to all defendants, and judgment is hereby granted in favor of defendants.

3. The motion of defendants Greater West Portal Neighborhood Association and Howard Strassner for attorneys' fees and sanctions is denied.

4. Defendants shall recover their costs incurred in these proceedings.

DATED: October 17, 1988

ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge

CITY AND COUNTY OF SAN FRANCISCO MUNICIPAL CODE

PLANNING CODE

VOLUME I

BOOK PUBLISHING COMPANY

(This volume includes Planning Code changes adopted through August 5, 1988, and Temporary Land Use Control changes through November 22, 1988.)

RM-3,RC-3	140
RM-4,RC-4	70
NC-1, NC-2, NC-S, Sacramento Street, West Portal Avenue	275
NC-3, NC-S, Castro Street, Inner Clement Street, Outer Clement Street, Upper Fillmore Street, Haight Street, Union Street, Valencia Street, 24th Street-Mission, 24th Street-Noe Valley	210
Broadway, Hayes-Gough, Upper Market Street, North Beach, Polk Street	140
Chinatown Community Business Chinatown Residential Neighborhood Commercial Chinatown Visitor Retail	70

(b) For purposes of calculating the maximum density for group housing as set forth herein, the number of bedrooms on a lot shall in no case be considered to be less than one bedroom for each two beds. Where the actual number of beds exceeds a average of two beds for each bedroom, each two beds shall be considered equivalent to one bedroom.

(c) The rules for calculation of dwelling unit densities set forth in Section 207.2 shall also apply in calculation of the density limitations for group housing, except that in NC Districts, and remaining fraction of ½ or more of the maximum amount of lot area per bedroom shall be adjusted upward to the next higher whole number of bedrooms. (Added by Ord. 443-78, App. 10/6/78; amended by Ord. 69-87, App. 3/13/87; Ord. 131-87, App. 4/24/87)

SEC 209. USES PERMITTED IN R DISTRICTS. (a) The uses listed in Sections 209.1 through 209.9 are permitted in R Districts as indicated by the following symbols in the respective columns for each district:

P: Permitted as a principal use in this district.

C: Subject to approval by the City Planning Commission as a conditional use in this district as provided in Section 303 of this Code.

NA: This listing not applicable to this district, as the same use is listed subsequently for the District with fewer restrictions.

Blank Space: Not permitted in this district.

(b) The Section titles are intended only as an aid to use of this Code and are not binding as to interpretation of these Sections. Uses listed in this table shall not include any use specifically listed elsewhere in the table.

(c) Determinations as to the classification of uses not specifically listed shall be made in the manner indicated in Sections 202 and 307(a) of this Code.

(d) References should be made to Sections 204 through 204.5 for regulations pertaining to accessory uses permitted for principal and conditional uses listed in Sections 209.1 through 209.9.

(e) Reference should also be made to the other Articles of this Code containing provisions relating to definitions, off-street parking and loading dimensions, areas and open spaces, nonconforming uses, height and bulk districts, signs, historic preservation, and other factors affecting the development and alteration of properties in these use Districts.

(f) Reference should be made to Section 249.1 for provisions pertaining to uses in the Residential Subdistrict of the Rincon Hill Special Use District. (Ord. 532-85 § 6, 1985: Amended Ord. 443-78, App. 10/6/78)

SEC. 209.1. DWELLINGS.

(a) One-family dwelling having side yards as required by Section 133 of this Code.

(b) Other one-family dwelling.

(c) Two-family dwelling with the second dwelling unit limited to 600 square feet of net floor area.

(d) Other two-family dwelling.

(e) Three-family dwelling.

(f) Dwelling at a density ratio up to one dwelling unit for each 3,000 square feet of lot area, but no more than three dwelling units per lot, if authorized as a conditional use by the City Planning Commission.

(g) Dwelling at a density ratio up to one dwelling unit for each 1,500 square feet of lot area, if authorized as a conditional use by the City Planning Commission.

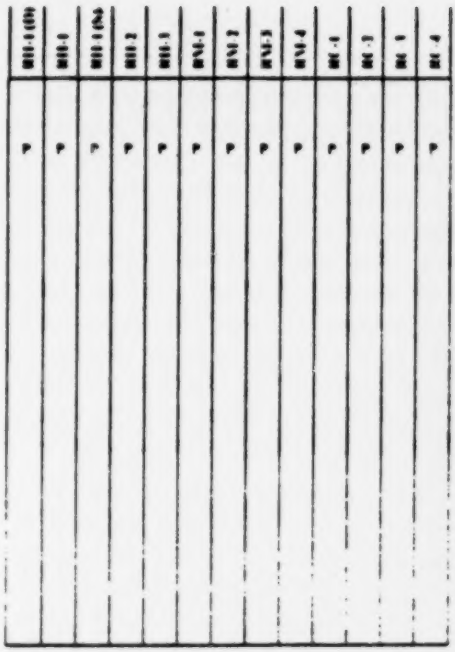
(h) Dwelling at a density ratio up to one dwelling unit for each 1,000 square feet of lot area, if authorized as a conditional use by the City Planning Commission.

(i) Dwelling at a density ratio not exceeding one dwelling unit for each 800 square feet of lot area.

(j) Dwelling at a density ratio not exceeding one dwelling unit for each 600 square feet of lot area.

(k) Dwelling at a density ratio not exceeding one dwelling unit for each 400 square feet of lot area.

(l) Dwelling at a density ratio not exceeding one dwelling unit for each 200 square feet of lot area; provided, that for purposes of this calculation a dwelling unit in these districts containing no more than 500 square feet of net floor area and consisting of not more than one habitable room in



addition to a kitchen and a bathroom may be counted as equal to ¾ of a dwelling unit.

(m) Dwelling specifically designed for and occupied by senior citizens or physically handicapped persons, at a density ratio or number of dwelling units not exceeding twice the number of dwelling units otherwise permitted above as a principal use in the district. Such dwellings shall be limited to such occupancy for the actual lifetime of the building by the requirements of State or Federal programs for housing for senior citizens or physically handicapped persons, or otherwise by design features and by legal arrangements approved as to form by the City Attorney and satisfactory to the Department of City Planning. (Added Ord. 443-78, App. 10/6/78)

SEC. 209.2. OTHER HOUSING.

(a) Group housing, boarding: Providing lodging or both meals and lodging, without individual cooking facilities, by prearrangement for a week or more at a time and housing six or more persons in a space not defined by this Code as a dwelling unit. Such group housing shall include but not necessarily be limited to a boardinghouse, guesthouse, roominghouse, lodginghouse, residence club, commune, fraternity and sorority house but shall not include group housing for religious orders or group housing for medical and educational institutions, whether on a separate lot or part of an institution, as defined and regulated by this Code. The density limitations for group housing, by district, shall be as set forth in Section 208 of this Code.

(b) Group housing, religious orders: Providing lodging or both meals and lodging, without individual cooking facilities, by prearrangement for a week or more at a time

RH-1(D)	RH-1	RH-1(S)	RM-1	RM-2	RM-3	RM-4	RC-1	RC-2	RC-3	RC-4
			C	C	C	C	C	C	C	C
			C	C	C	C	C	C	P	P	P	P
									C	C	C	C

and housing six or more persons in a space not defined by this Code as a dwelling unit, where such housing is for members of a religious order calling for collective work or worship and is not defined as, or on the same lot as, a religious institution as defined and regulated by Section 209.3(j) of this Code. Such housing shall include but not necessarily be limited to a monastery, nunnery, convent and ashram. The density limitations for group housing, by district, shall be as set forth in Section 208 of this Code.

(c) Group housing, medical and educational institutions: Providing lodging or both meals and lodging, without individual cooking facilities, by prearrangement for a week or more at a time and housing six or more persons in a space not defined by this Code as a dwelling unit, where such facility is affiliated with and operated by a medical or educational institution as defined and regulated by Sections 209.3(a), (g), (h) and (i) of this Code but not located on the same lot as such institution and not used for inpatient care. Such housing shall meet the applicable provisions of Section 304.5 of this Code concerning institutional master plans. The density limitations for group housing, by district, shall be as set forth in Section 208 of this Code.

(d) Hotel, inn or hostel containing no more than five rooms or suites of rooms, none with individual cooking facilities, which are offered for compensation and are primarily for the accommodation of transient overnight guests. A hotel, inn or hostel shall not include a motel as defined and regulated by Section 216(c) of this Code.

(e) Hotel, inn or hostel as specified in Subsection 209.2(d) above but with six or more guestrooms or suites. (Added Ord. 443-78, App. 10/6/78)

RH-1 (D)	RH-1	RH-1 (S)	RH-2	RH-3	RM-1	RM-2	RM-3	RM-4	RC-1	RC-2	RC-3	RC-4
C	C	C	C	C	C	C	C	C	C	C	C	C
P	P	P	P	P	P	P	P	P	P	P	P	P
C	C	C	C	C	C	C	C	C	C	C	C	C
									C	C	C	C
P	P	P	P	P	P	P	P	P	P	P	P	P
C	C	C	C	C	C	C	C	C	C	C	C	C

SEC. 209.3. INSTITUTIONS. (a) Hospital, medical center or other medical institution which includes facilities for inpatient care and may also include medical offices, clinics, laboratories, and employee or student dormitories and other housing, operated by and affiliated with the institution, which institution has met the applicable provisions of Section 304.5 of this Code concerning institutional master plans.

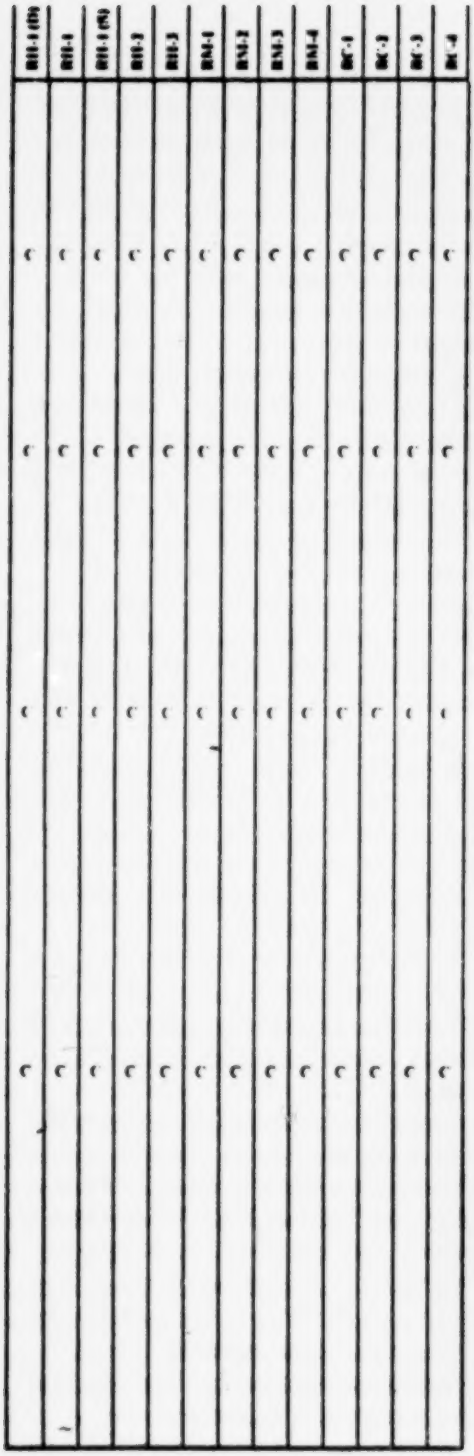
(b) Residential care facility providing lodging, board and care for a period of 24 hours or more to six or fewer persons in need of specialized aid by personnel licensed by the State of California. Such facility shall display nothing on or near the facility which gives an outward indication of the nature of the occupancy except for a sign as permitted by Article 6 of this Code, shall not provide outpatient services and shall be located in a structure which remains residential in character. Such facilities shall include but not necessarily be limited to a board and care home, family care home, long-term nursery, orphanage, rest home or home for the treatment of addictive, contagious or other diseases or psychological disorders.

(c) Residential care facility meeting all applicable requirements of Subsection 209.3(b) above but providing lodging, board and care as specified therein to seven or more persons.

(d) Social service or philanthropic facility providing assistance of a charitable or public service nature and not of a profit-making or commercial nature. (With respect to RC Districts, see also Section 209.9(d).)

(e) Child-care facility providing less than 24-hour care for 12 or fewer children by licensed personnel and meeting the open-space and other requirements of the State of California and other authorities.

(f) Child-care facility providing less than 24-hour care for 13 or more children by



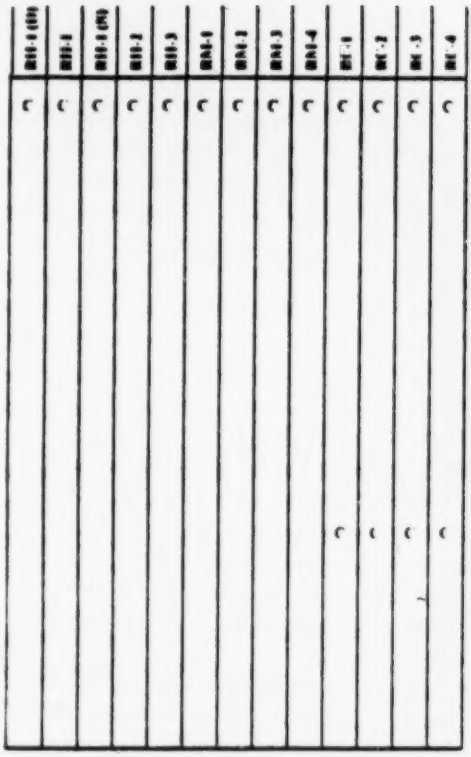
licensed personnel and meeting the open-space and other requirements of the State of California and other authorities. (With respect to RC Districts, see also Section 209.9(d).)

(g) Elementary school, either public or private. Such institution may include employee or student dormitories and other housing operated by and affiliated with the institution. (With respect to RC Districts, see also Section 209.9(d).)

(h) Secondary school, either public or private, other than a school having industrial arts as its primary course of study. Such institution may include employee or student dormitories and other housing operated by and affiliated with the institution. (With respect to RC Districts, see also Section 209.9(d).)

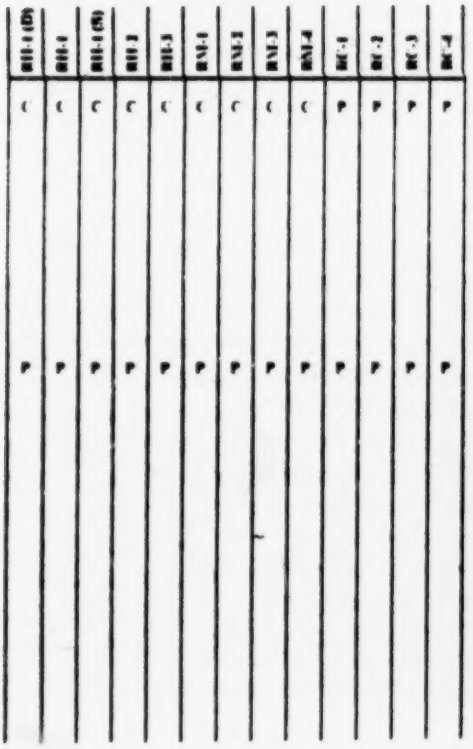
(i) Postsecondary educational institution for the purposes of academic, professional, business or fine arts education, which institution has met the applicable provisions of Section 304.5 of this Code concerning institutional master plans. Such institution may include employee or student dormitories and other housing operated by and affiliated with the institution. Such institution shall not have industrial arts as its primary course of study.

(j) Church or other religious institution which has a tax-exempt status as a religious institution granted by the United States Government, and which institution is used primarily for collective worship or ritual or observance of common religious beliefs. Such institution may include, on the same lot, the housing of persons who engage in supportive activity for the institution. (With respect to RC Districts, see also Section 209.9(d).) (Added by Ord. 443-78, App. 10/6/78; amended by Ord. 115-90, App. 4/6/90)



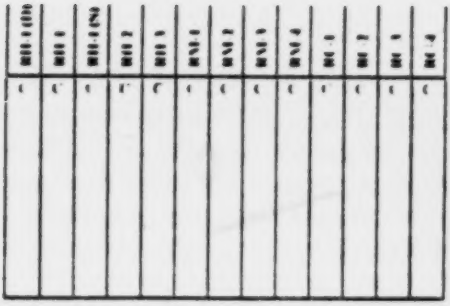
SEC. 209.4. COMMUNITY FACILITIES. (a) Community clubhouse, neighborhood center, community cultural center or other community facility not publicly owned but open for public use, in which the chief activity is not carried on as a gainful business and whose chief function is the gathering of persons from the immediate neighborhood in a structure for the purposes of recreation, culture, social interaction or education other than that regulated by Section 209.3 of this Code. (With respect to RC Districts, see also Section 209.9(d).)

(b) Private lodge, private clubhouse, private recreational facility or community facility other than as specified in Subsection 209.4(a) above, and which is not operated as a gainful business. (With respect to RC Districts, see also Section 209.9(d).) (Added Ord. 443-78, App. 10/6/78)



SEC. 209.5. OPEN RECREATION AND HORTICULTURE. (a) Open recreation area not publicly owned which is not screened from public view, has no structures other than those necessary and incidental to the open land use, is not operated as a gainful business and is devoted to outdoor recreation such as golf, tennis or riding.

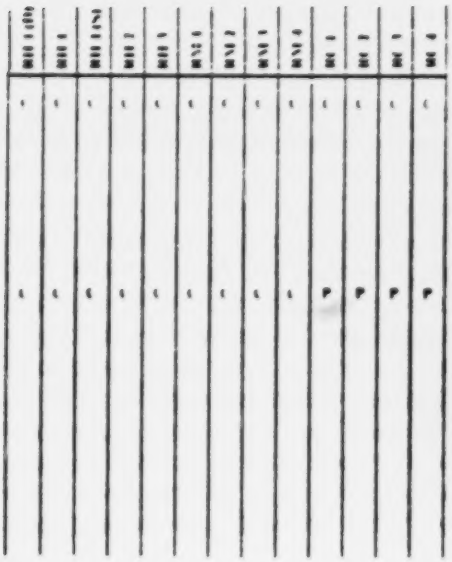
(b) Open space used for horticultural or passive recreational purposes which is not publicly owned and is not screened from public view, has no structures other than those necessary and incidental to the open land use, is not served by vehicles other than normal maintenance equipment, and has no retail or wholesale sales on the premises. Such open space may include but not necessarily be limited to a park, playground, plant nursery, rest area, community garden or neighborhood garden.



(c) Greenhouse, plant nursery, truck garden or other land or structure devoted to cultivation of plants of any kind, either with or without retail or wholesale sales on the premises. (With respect to RC Districts, see also Section 209.9(d).) (Added Ord. 443-78, App. 10/6/78)

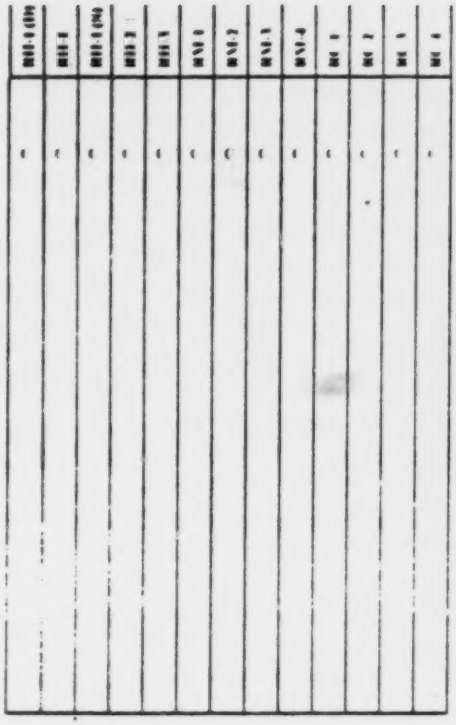
SEC. 209.6. PUBLIC FACILITIES AND UTILITIES. (a) Public structure or use of a nonindustrial character, when in conformity with the Master Plan. Such structure or use shall not include a storage yard, incinerator, machine shop, garage or similar use.

(b) Utility installation, including but not necessarily limited to water, gas, electric, transportation or communications utilities, or public service facility, provided that operating requirements necessitate placement at this location. (Added Ord. 443-78, App. 10/6/78)



SEC. 209.7. VEHICLE STORAGE AND ACCESS. (a) Community garage, confined to the storage of private passenger automobiles of residents of the immediate vicinity, and meeting the requirements of Article 1.5 of this Code.

(b) Access driveway to property in C or M District, or to property in an R District in which the permitted dwelling unit density is greater than that permitted in the district where the driveway is located, provided that a solid fence, solid wall, or compact evergreen hedge, not less than six feet in height, is maintained along such driveway to screen it from any adjoining lot in any R District.



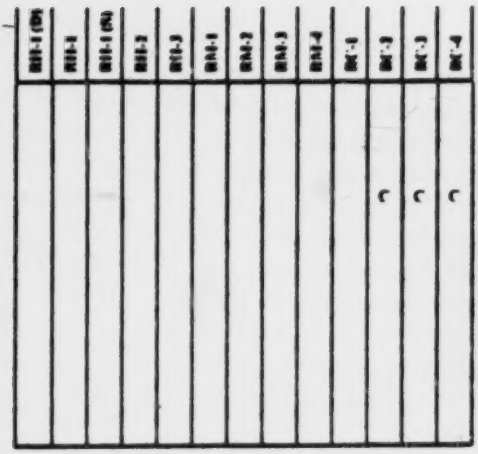
Such driveway shall meet the applicable requirements of Article 1.5 of this Code.

(c) Off-street parking facility to serve a use permitted in any R District, when such parking is not classified as accessory parking for such use, under the provisions of Section 204.5 of this Code, in terms of its location and amount. Such parking shall meet, where applicable, the requirements of Section 156 for parking lots, Section 159 for parking not on the same lot as the building or use served, and the other provisions of Article 1.5 of this Code. In considering any application for a conditional use for such parking where the amount of parking provided exceeds the amount classified as accessory parking in Section 204.5, the Planning Commission shall consider the criteria set forth in Section 157 of this Code. (Added Ord. 443-78, App. 10/6/78)

SEC. 209.8. COMMERCIAL ESTABLISHMENTS. (a) Retail, personal service or other commercial establishment permitted as a principal use in a C-1 District, which is located within or below the ground story of a building; excluding any establishment designed primarily for customers arriving at that establishment by private motor vehicle.

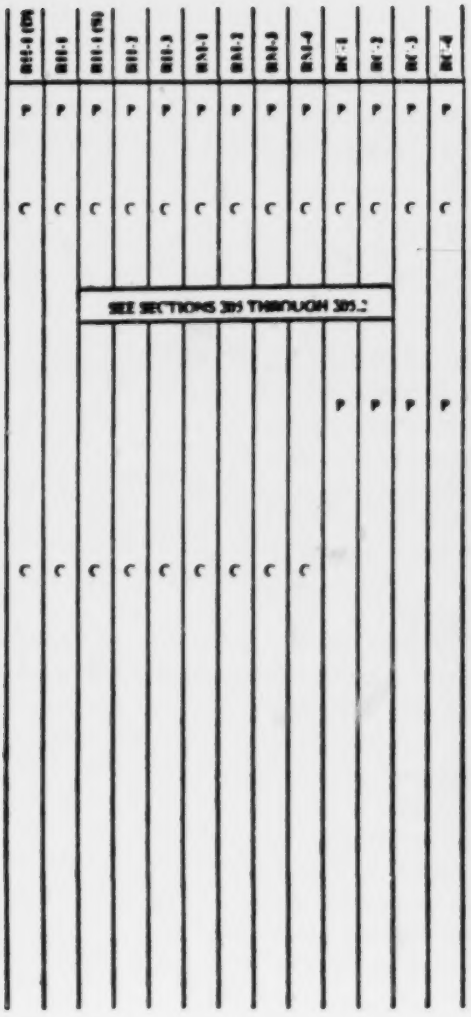
(b) Retail, personal service or other commercial establishment permitted as a principal use in a C-1 District, which is located in a building above the ground story; excluding any establishment designed primarily for customers arriving at that establishment by private motor vehicle.

(c) Retail, personal service or other commercial establishment permitted as a principal use in a C-2 District, which is located within or below the ground story of a



building; excluding any establishment designed primarily for customers arriving at that establishment by private motor vehicle.

(d) Retail, personal service or other commercial establishment permitted as a principal use in a C-2 District, which is located in a building above the ground story; excluding any establishment designed primarily for customers arriving at that establishment by private motor vehicle. (Added by Ord. 443-78, App. 10/6/78)



SEC. 209.9. OTHER USES. (a) Sale or lease sign, as defined and regulated by Article 6 of this Code.

(b) Planned Unit Development, as defined and regulated by Section 304 and other applicable provisions of this Code.

(c) Temporary uses, as specified in and regulated by Sections 205 through 205.2 of this Code.

(d) Any use as specified in, and regulated by, Sections 209.3(d),(f),(g),(h),(j); 209.4(a),(b); or 209.5(c) of this Code, when located in or below the ground story of a building and not above the ground story.

(e) Any use listed as a principal or conditional use permitted in an RC-1 District, when located in a structure on a landmark site designated pursuant to Article 10 of this Code, provided that:

(1) No application for a conditional use under this provision shall be accepted for filing until a period of 180 days shall have elapsed after the date of designation of the landmark; and

(2) No conditional use shall be authorized under this provision unless such authorization conforms to the applicable provisions of Section 303 of this Code and,

(2) A proposed amendment or part that had been introduced by a member of the Board of Supervisors to reclassify property or to establish, abolish or modify a setback line shall be presented to said Board, together with a copy of the resolution of disapproval, and said amendment or part may be adopted by said Board only by a vote of not less than ⅔ of all the members of said board.

(3) In all other cases, the disapproval of the City Planning Commission shall be final, except upon the filing of a valid appeal to the Board of Supervisors as provided in Section 308.1 in the case of a proposed amendment or part that has been initiated by application to reclassify property or to establish, abolish or modify a setback line.

(d) *Referral of Proposed Text Amendment Back to City Planning Commission.* In acting upon any proposed amendment to the text of the Code, the Board of Supervisors may modify said amendment but shall not take final action upon any material modification that has not been approved or disapproved by the City Planning Commission. Should the Board adopt a motion proposing to modify the amendment while it is before the Board, said amendment and the motion proposing modification shall be referred back to the City Planning Commission for its consideration. In all such cases of referral back, the amendment and the proposed modification shall be heard by the City Planning Commission according to the requirements for a new proposal, except that newspaper notice required under Section 306.3 need be given only 10 days prior to the date of the hearing. The motion proposing modification shall refer to, and incorporate by reference, a proposed amendment approved by the City Attorney as to form. (Amended by Ord. 210-84, App. 5/4/84; Ord. 42-87, App. 2/20/87)

SEC. 303. CONDITIONAL USES. (a) *General.* The City Planning Commission shall hear and make determinations regarding applications for the authorization of conditional uses in the specific situations in which such authorization is provided for elsewhere in this Code. The procedures for conditional uses shall be as specific in this Section and in Sections 306 through 306.6, except that Planned Unit Developments shall in addition be subject to Section 304, medical institutions and post-secondary educational institutions shall in addition be subject to the institutional master plan requirements of Section 304.5, and conditional use and Planned Unit Development applicants filed pursuant to Article 7, or otherwise required by this Code for uses or features in Neighborhood Commercial Districts, shall be subject to the provisions set forth in Sections 316 through 316.8 of this Code, in lieu of those provided for in Sections 306.2 and 306.3 of this Code, with respect to

scheduling and notice of hearings, and in addition to those provided for in Sections 306.4 and 306.5 of this Code, with respect to conduct of hearings and reconsideration.

(b) *Initiation.* A conditional use action may be initiated by application of the owner, or authorized agent for the owner, of the property for which the conditional use is sought.

(c) *Determination.* After its hearing on the application, or upon the recommendation of the Director of Planning if the application is filed pursuant to Sections 316 through 316.8 of this Code and no hearing is required, the City Planning Commission shall approve the application and authorize a conditional use if the facts presented are such to establish:

(1) That the proposed use or feature, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable for, and compatible with, the neighborhood or the community; and

(2) That such use or feature as proposed will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity, or injurious to property, improvements or potential development in the vicinity, with respect to aspects including but not limited to the following:

(A) The nature of the proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;

(B) The accessibilift ty and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;

(C) The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor.

(D) Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs; and

(3) That such use of feature as proposed will comply with the applicable provisions of this Code and will not adversely affect the Master Plan; and

(4) With respect to applications filed pursuant to Article 7 of this Code; that such use or feature as proposed will provide development that

is in conformity with the stated purpose of the applicable Neighborhood Commercial District, as set forth in zoning control category .1 of Sections 710 through 729 of this Code; and

(5)(A) With respect to applications filed pursuant to Article 7, Section 703.2(a), zoning categories .46, .47, and .48, in lieu of the criteria set forth above in Section 303(c)(1—4), that such use or feature will:

(i) Not be located withing 1000 feet of another such use, if the proposed use or feature is included in zoning category .47, as defined by Section 790.36 of this Code; and/or

(ii) Not be open between two a.m. and six a.m.; and

(iii) Not use electronic amplification between midnight and six a.m.; and

(iv) Be adequately soundproofed or insulated for noise and operated so that incidential noise shall be be audible beyond the premises or in other sections of the building and fixed source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.

(B) Notwithstanding the above, the City Planning Commission may authorize a conditional use which does not satisfy the criteria set forth in (5)(A)(ii) and/or (5)(A)(III) above, if facts presented and such to establish that the use will be operated in such a way as to minimize disruption to residences in and around the district with respect to noise and crowd control.

Such action of the City Planning Commission, in either approving or disapproving the application, shall be final except upon the filing of a valid appeal to the Board of Supervisors as provided in Section 308.1

(d) *Conditions.* When authorizing a conditional use as provided herein, the City Planning Commission, or the Board of Supervisors on appeal, shall prescribe such additional conditions, beyond those specified in this Code, as are in its opinion necessary to secure the objectives of the Code. Once any portion of the conditional use authorization is utilized, all such conditions pertaining to such authorization shall become immediately operative. The violation of any condition so imposed shall constitute a violation of this Code and may constitute grounds for revocation of the conditional use authorization. Such conditions may include time limits for exercise of the conditional use authori-

zation; otherwise, any exercise of such authorization must commence within a reasonable time.

(e) *Modification of Conditions.* Authorization of a change in any condition previously imposed in the authorization of a conditional use shall be subject to the same procedures as a new conditional use. Such procedures shall also apply to applications for modification or waiver of conditions set forth in prior stipulations and covenants relative thereto continued in effect by the provisions of Section 174 of this Code. (Amended by Ord. 443-78, App. 10/6/78; Ord. 69-87, App. 3/13/87)

SEC. 304. PLANNED UNIT DEVELOPMENTS. In districts other than C-3, the City Planning Commission may authorize as conditional uses, in accordance with the provisions of Section 303. Planned Unit Developments subject to the further requirements and procedures of this Section. After review of any proposed development, the City Planning Commission may authorize such developments as submitted or may modify, alter adjust or amend the plan before authorization, and in authorizing it may prescribe other conditions as provided in Section 303(d). The development as authorized shall be subject to all conditions so imposed and shall be excepted from other provisions of this Code only to the extent specified in the authorization.

(a) *Objectives.* The procedures for Planned Unit development are intended for projects on sites of considerable size, developed as integrated units and designed to produce an environment of stable and desirable character which will benefit the occupants, the neighborhood and the City as a whole. In cases of outstanding overall design, complementary to the design and values of the surrounding area, such a project may merit a well reasoned modification of certain of the provisions contained elsewhere in this Code.

(b) *Nature of Site.* The tract or parcel of land involved must be either in one ownership, or the subject of an application filed jointly by the owners of all the property included or by the Redevelopment Agency of the City. It must constitute all or part of a Redevelopment Project Area, or if not must include an area of not less than ½ acre, exclusive of streets, alleys and other public property that will remain undeveloped.

(c) *Application and Plans.* The application must describe the proposed development in detail, and must be accompanied by an overall development plan showing, among other things, the use or uses, dimensions and locations of structures, parking spaces, and areas, if any, to be reserved for streets, open spaces and other public purposes. The application must include such pertinent

information as may be necessary to a determination that the objectives of this Section are met, and that the proposed development warrants the modification of provisions otherwise applicable under this Code.

(d) *Criteria and Limitations.* The proposed development must meet the criteria applicable to conditional uses as stated in Section 303(c) and elsewhere in this Code. In addition, it shall:

(1) Affirmatively promote applicable objectives and policies of the Master Plan.

(2) Provide off-street parking adequate for the occupancy proposed;

(3) Provide open space usable by the occupants and, where appropriate, by

* * *

(b) *Initiation.* A variance action may be initiated by application of the owner, or authorized agent for the owner, of the property for which the variance is sought.

(c) *Determination.* The Zoning Administrator shall hold a hearing on the application, provided, however, that if the variance requested involves a deviation of less than 10 percent from the Code requirement, the Zoning Administrator may at his option either hold or not hold such a hearing. No variance shall be granted in whole or in part unless there exist, and the Zoning Administrator specifies in his findings as part of a written decision, facts sufficient to establish:

(1) That there are exceptional or extraordinary circumstances applying to the property involved or to the intended use of the property that do not apply generally to other property or uses in the same class of district;

(2) That owning to such exceptional or extraordinary circumstances the literal enforcement of specified provisions of this Code would result in practical difficulty or unnecessary hardship not created by or attributable to the applicant or the owner of the property;

(3) That such variance is necessary for the preservation and enjoyment of a substantial property right of the subject property, possessed by other property in the same class of district;

(4) That the granting of such variance will not be materially detrimental to the public welfare or materially injurious to the property or improvements in the vicinity; and

(5) That the granting of such variance will be in harmony with the general purpose and intent of this Code and will not adversely affect the Master Plan.

Upon issuing his written decision either granting or denying the variance in whole or in part, the Zoning Administrator shall forthwith transmit a copy thereof to the applicant. The action of the Zoning Administrator shall be final and shall become effective 10 days after the date of his written decision except upon the filing of a valid appeal to the Board of Permit Appeals as provided in Section 308.2.

(d) *Conditions.* In granting any variance as provided herein, the Zoning Administrator, or the Board of Permit Appeals on appeal, shall specify the character and extent thereof, and shall also prescribe such conditions as are necessary to secure the objectives of this Code. Once any portion of the granted variance is utilized, all such specifications and conditions pertaining to such authorization shall become immediately operative. The violation of any specification or condition so imposed shall constitute a violation of this Code and may constitute grounds for revocation of the variance. Such conditions may include time limits for exercise of the granted variance; otherwise, any exercise of such variance must commence within a reasonable time. (Amended by Ord. 234-72. App. 8/18/72)

SEC. 306. APPLICATIONS AND HEARINGS. In case of an amendment, interim control, conditional use or variance actions described in Sections 302 through 305 and 306.7 of this Code, the procedures for applications and hearings shall be as described in Sections 306 through 306.7. In addition, the Zoning Administrator and the City Planning Commission may from time to time establish policies, rules and regulations which further define these procedures. (Amended by Ord. 210-84, App. 5/4/84)

MASTER PLAN

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT OF CITY PLANNING

RESIDENCE

AN ELEMENT OF THE MASTER PLAN OF
THE CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT OF CITY PLANNING

The City Planning, Building and Housing codes influence the price of new housing and the cost of maintaining existing housing. The City's codes should be reviewed regularly to ensure that standards and requirements do not unduly restrict needed housing development or unnecessarily increase the cost of housing. In administering codes, departments should regularly evaluate whether standards can be modified, without sacrificing quality and safety, to aid in lowering the cost of new housing. In hardship cases Housing Code requirements should be deferred to the extent legally permissible if all life safety hazards are abated. In particular, the City should extend the period allowed for code compliance to avoid potential displacement of low- or moderate-income households until replacement housing can be found.

NEIGHBORHOOD ENVIRONMENT

OBJECTIVE 6

TO PROVIDE A QUALITY LIVING ENVIRONMENT.

Housing quality involves not only the physical condition of housing structure itself but also the condition of the surrounding neighborhood and the adequacy of its amenities, facilities, and services. Proper housing development must also address these matters.

POLICY 1

Assure housing is provided with adequate public improvements, services and amenities.

Many factors add to neighborhood livability, including the quality of schools, the effectiveness of police and fire services, and access to open space and recreational opportunities. Regular maintenance of streets and sidewalks, provision of street trees, and protection of residential areas from excessive traffic, are also important to neighborhood life. Good design of buildings can add amenity to the neighborhood. All of these factors should be addressed by the City in providing its residents a quality living environment.

POLICY 2

Allow appropriate neighborhood-serving commercial activities in residential areas.

Certain non-residential uses are desirable and appropriate in residential areas. For example, small pedestrian-oriented grocery stores, other convenience shops, and community services (such as child care) can meet frequent and recurring needs of residents without disrupting the residential character of the area. On the other hand, other types of non-residential uses are noisy, or unattractive, or generate excessive traffic, and therefore would be undesirable in residential areas.

Non-residential uses should be allowed in exclusively residential areas only if they meet the following criteria:

- The use is primarily pedestrian-oriented.
- The use serves the needs of the immediate residential neighborhood and does not draw significant trade from outside the neighborhood.
- The use does not displace a unit suitable for residential occupancy.
- The use does not disrupt or detract from the livability of the surrounding neighborhood.
- There are no suitable locations in immediately adjacent commercial or mixed commercial and residential areas.
- The design of the building is in keeping with the established residential character of the area, and all signs are carefully regulated.
- Truck traffic servicing the use is minimized, and truck delivery hours are restricted.

Non-residential uses may also be advantageous for residential areas if they are essential to the preservation of a landmark building, although the use should be compatible with the surrounding environment.

POLICY 3

Minimize disruption caused by expansion of institutions into residential areas.

mitted to continue, which penalty shall be assessed and recovered in a civil action brought in the name of the people of the City and County of San Francisco by the City Attorney in any court of competent jurisdiction. Any penalty assessed and recovered in an action brought pursuant to this paragraph shall be paid to the City Treasurer.

Any person, the owner or his authorized agent, who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this code, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $500, or by imprisonment, not exceeding six months, or by both such fine and imprisonment, unless otherwise provided in this code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue. Any person which shall do any work in violation of any of the provisions of this code, and any person having charge of such work who shall permit it to be done, shall be liable to the penalty provided.

It shall be unlawful for any person to interfere with the posting of any notice provided for in this Chapter, or to tear down or mutilate any such notice so posted by the Department of Public Works in or upon any building or premises.

Public Nuisance.

Sec. 206. Any building, structure or property which is in violation of law or ordinance is declared to be a public nuisance. All such buildings, structures and properties shall be vacated, repaired, altered or demolished as provided for in Section 203.

Seismic Investigation and Hazard Survey Advisory Committee.

Sec. 207. (a) *Establishment.* There is hereby created an advisory committee to the Board of Supervisors to be known as the Seismic Investigation and Hazard Survey Advisory Committee thereinafter referred to in this section as "the Committee" whose function and purpose shall be to keep the Board appraised of updated seismic hazard information, to review and recommend

engineering and planning criteria necessary for the reduction of seismic hazard related to geology, to recommend criteria for seismic investigation and instrumentation, geology, to recommend criteria for seismic investigation and instrumentation, to study, subject to the provisions of Chapter 7 of the San Francisco Administrative Code, post-disaster operation plans and reconstruction criteria and to recommend to the Board of Supervisors such legislation as the Committee deems necessary to improve structural resistance to, and to minimize the risks associated with seismic disturbances.

(b) *Composition; Terms; Qualifications; Appointments; Chairman.* The Committee shall consist of 16 members appointed by the Director, subject to the approval of the Chief Administrative Officer and the Board of Supervisors, and shall serve at the pleasure of said Board for three year terms. The members

* * *

(e) For purposes of this section, the term "agricultural activity, operation, or facility, or appurtenances thereof" shall include, but not be limited to, the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural commodity including timber, viticulture, apiculture, or horticulture, the raising of livestock, fur bearing animals, fish, or poultry, and any practices performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market. [1981 ch 545 § 1.] *Witkin Summary (8th ed) Equity § 105A.*

§§ 3482.6, 3482.7. [Repealed, effective January 1, 1985, by their own terms.]

§ 3483. Successive owners. Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it. [1872.] *Cal Jur 3d Nuisances § 34.*

§ 3484. Abatement does not preclude action. The abatement of a nuisance does not prejudice the right of any person to

recover damages for its past existence. [1872.] *Cal Jur 3d Nuisances § 59; Cal Practice § 240:5.*

TITLE 2

Public Nuisances

§ 3490. Lapse of time does not legalize.
§ 3491. Remedies against public nuisance.
§ 3492. Remedy regulated, how.
§ 3493. Remedies for public nuisance.
§ 3494. Action.
§ 3495. How abated.
§ 3496. Award of costs and fees to prevailing party

Cal Jur 3d Nuisances §§ 5 et seq.; Cal Practice Ch 240 Model Action to Abate Nuisance and for Damages; Proceeding Under Red Light Abatement Law.

§ 3490. Lapse of time does not legalize. No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right. [1872.] *Cal Practice § 240:35; Witkin Procedure (3d) Actions § 348; Witkin Summary (8th ed) p 5316.*

§ 3491. [Remedies against public nuisance.] The remedies against a public nuisance are:

1. Indictment or information;
2. A civil action; or,
3. Abatement. [1872; 1880 ch 11§ 1.] *Cal Jur 3d Nuisances § 37, Statutes § 3; Cal Jur 3d (Rev) Criminal Law §§ 1696, 2727; Witkin Summary (8th ed) p 5324.*

§ 3492. [Remedy regulated, how.] [The remedy by indictment or information is regulated by the Penal Code. [1872; 1880 ch 11 § 2.] *Cal Jur 3d (Rev) Criminal Law § 1693.*

§ 3493. Remedies for public nuisance. A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise. [1872.] *Cal Jur 3d Nuisances § 26.*

§ 3494. Action. A public nuisance may be abated by any public body or officer authorized thereto by law. [1872.] *Cal Jur 3d Nuisances § 37.*

§ 3495. How abated. Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury. [1872.] *Cal Jur 3d Nuisances § 37; Witkin Summary (8th ed) p 5324.*

§ 3496. [Award of costs and fees to prevailing party] In any of the following described cases, the court may award costs, including the costs of investigation and discovery, and reasonable attorneys' fees, which are not compensated for pursuant to some other provision of law, to the prevailing party:

(a) In any case in which a governmental agency seeks to enjoin the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code.

(b) In any case in which a governmental agency seeks to enjoin the use of a building